83-1661

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the managerial exclusion in NLRB v. Yeshiva University, 444 U.S. 672 (1980), should be limited to highly paid professional faculty at mature universities who exercise "absolute" authority over academic matters or whether it applies to other employees, including psychosocial rehabilitation staff, who substantially determine an institution's program and development.

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Petitioner Brooklyn Psychosocial Rehabilitation Institute Inc. respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Cir-

cuit entered in this proceeding on January 13, 1984.

OPINIONS BELOW

The opinion of the court of appeals is not reported, but is annexed hereto as Appendix B (A.9-12). 1/ The Decision and Order of the National Labor Relations Board ("the Board") is reported at 264 NLRB 114 (1982), and is annexed hereto as Appendix C (A.13-50). The Regional Director's Decision and Direction of Election, annexed as Appendix E (A.116-155), and Supplemental Decision and Order, annexed as Appendix D (A.51-115), in

1/"A." refers to the pages in the Appendix attached hereto.

the underlying representation proceeding are not reported.

JURISDICTION

The order and opinion of the court of appeals (A.9-12) was entered on January 13, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

STATUTE INVOLVED

The statute involved, is the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§151, 152(3), 157, 158(a)(1) & (5), 160(e) (1976). The text of the pertinent provisions is set forth in Appendix A annexed hereto (A.1-8).

STATEMENT OF THE CASE

On December 10, 1979, District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("the Union"), filed a petition with the Board's Regional Office in Brooklyn, New York, seeking to represent a unit of all employees at Brooklyn Psychosocial Rehabilitation Institute, Inc. ("the Institute"). At the hearing on the petition, the Union amended its petition, requesting a unit, or separate units, consisting of professional and technical employees, excluding certain employees. The Institute maintained that the only appropriate unit consisted of all statutory employees.

On March 24, 1980, the Regional Director issued his Decision and

Direction of Election (A.116-155). A unit of technical employees, including counselors, was found appropriate (A.149-150). The Institute's request for review of this determination under 29 C.F.R. §101.21(d) was denied by the Board, without discussion.

On April 30, 1980 an election was held in the unit found appropriate in which the Union received a majority of the ballots cast and on May 16, 1980, the Regional Director certified the Union as representative of the unit employees.

On July 14, 1980, the Institute requested that the Regional Director reexamine the appropriateness of the certified bargaining unit in light of this Court's decision in NLRB v.

Yeshiva University, 444 U.S. 672 (1980), and as a result of changed circumstances at the Institute since the time of the hearing. On September 8, 1980, the Institute renewed its request for reexamination of the appropriateness of the certification in a Motion for Rehearing, Reconsideration and Reopening of the Record. On February 17, 1981, the Regional Director granted the Institute's Motion. A further hearing was thus held from March 31, 1981 through May 4, 1981 for the limited purpose of adducing evidence on the unit employees' (referred to as "counselors/ /managers") managerial status in light of Yeshiva.

The Regional Director issued a Supplemental Decision and Order on

November 4, 1981, in which he found, inter alia, that:

> The [Institute] presented evidence that similar to the faculty at Yeshiva, the counselors/[managers] make final decisions or effective recommendations as to (1) what groups will be offered, (i.e. curriculum), (2) what teaching methods will be used in the group, (3) what members will attend the group, (4) the size of the group, (5) which counselors will lead a particular group, (6) who will be admitted into the facility, (7) who will be discharged or expelled from the facility, and (8) what supplies shall be ordered for particular groups.

(A.88-89). The Regional Director also noted that:

> The record of the first hearing reflects that ... counselors/[managers] at both facilities led structured groups, ..., set up a member's program, acted as role models for the members/residents, ... worked with outside agencies such as the Social Security Administration and Medicaid, filled out discharge summaries, evaluated members/resi-

> dents as to their need for hospitalization, and handled their own caseloads. ... Counselors/[managers] had to prepare activity schedules, treatment plan, semi-monthly reports and attendance and performance records....

(A.61-63). He continued:

> There was also evidence presented that following March 1980 counselors/[managers] continued their practice of deciding, as a group, what groups/programs to offer, when the groups will be offered, who will lead the groups, how many members will be in the groups, and what teaching methods will be used in the groups. Again, the testimony indicated the counselors/[managers] made these decisions without needing approval from the Administrator (sic)(footnotes omitted).

(A.106). Nevertheless, the Regional Director affirmed the certification. (A. 114). The Institute's Request For Review of this Decision was summarily denied by the Board on March 12, 1982.

Upon charges filed by the Union on June 19, 1980, the Board issued a complaint against the Institute on July 31, 1980, asserting that the Institute had violated §§8(a)(5) and (1) of the Act. On June 11, 1982, the Board's General Counsel moved for summary judgment upon the entire record, including the record in the representation case. See 29 C.F.R. §§102.24, 102.50 (1982). The Board granted General Counsel's motion and issued a bargaining order on September 27, 1982 (A.29, 43-48).

The court of appeals granted enforcement of the Board's order, concluding that the Institute's counselors/managers did not have the "absolute" authority over academic matters required by Yeshiva. National Labor

Relations Act, §10(e), 29 U.S.C. §160(e). Additionally, the court of appeals cited the Institute's failure to show that unit personnel met certain criteria, discussed below, not relied on in Yeshiva.

This petition follows. 2/

2/On February 17, 1984, Mr. Justice Marshall denied Petitioner's application for a stay of enforcement of the court of appeals' judgment pending this petition.

REASON FOR GRANTING THE WRIT

This Case Presents Important Questions Of Federal Law Which Have Not Been, But Should Be, Decided By This Court.

The Institute maintains that the court of appeals' decision here has improperly denied managerial status to eligible persons on grounds of little or no significance under the rationale of NLRB v. Yeshiva University, 444 U.S. 672 (1980).

While acknowledging their Yeshiva-like duties, the Board, with court of appeals' approval, found that the counselors/managers were not managerial employees, because certain conditions were not met or the unit personnel did not exercise certain additional responsibilities which the Board believed were essential. These

further requirements were not mandated by this Court's decision in Yeshiva and, in the Institute's view, should not have been considered.

1. The size of an institution does not determine its employees' status.

In his Supplemental Decision, the Regional Director found that Yeshiva was inapplicable here, because "unlike Yeshiva, which is a very mature university, the [Institute] is a relatively small rehabilitation center." (A.83). The Regional Director's rationale is without support.

Yeshiva contains no language to suggest that this Court found the professors to be managerial employees because of the size of the University. The size of an institution is

not determinative of a person's status. Rather, it is an individual's job duties, authority and responsibility which will determine managerial status. The court of appeals' endorsement of the Board's use of institutional size as a yardstick for determining managerial status is erroneous.

2. The ratio of administrators to managers was never addressed by this Court.

The court of appeals, like the Board, found an absence of managerial status because the Institute's administration did not rely heavily on the advice and professional judgment of the counselors/managers. (A.91) To support this finding, the Board noted that, unlike Yeshiva, the Institute's staff size was small, and

the administration/managerial staff ratio was also small, approximately 1 to 4 (A.83, 91). Thus, it reasoned, the Institute was not compelled to rely on the advice and judgment of the counselors/managers (A.91-92).

There is no legal basis for this determination. This Court did not address the ratio issue in Yeshiva. Nowhere in Yeshiva did the Court state that a critical ratio of administrators to managers must exist in order to find managerial status. Nor does that case suggest that the administration's reliance on the advice and judgment of its managers must result from force of circumstance rather than a voluntary sharing of authority.

3. Yeshiva does not state that the nature of the Institute is a function of managerial status.

In his Supplemental Decision, the Regional Director determined that, because its goal was to rehabilitate persons, the Institute should be ineligible for treatment under Yeshiva. It operated "more like a health care institution than an educational institution," he reasoned. (A.84). The basis for this conclusion was the Regional Director's finding that "unlike a university where students attend voluntarily to improve or advance their career and educational goals, the members/residents at the [Institute's] facility attend programs or groups because they cannot yet function normally in society." (A.84).

Yeshiva merely applied the managerial exclusion defined in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), to collegially exercised authority in a non-industrial setting. 444 U.S. at 682.

Nothing in Yeshiva limits the managerial exclusion to employees of "mature universities". The word, "mature", as used in Yeshiva was not meant to limit its application to professors teaching in venerable buildings. Rather, it was simply descriptive of the particular institution there under consideration. 444 U.S. at 680.

In any event, an essential feature of rehabilitation, particularly at the Institute, is teaching. As the professors in Yeshiva passed on their

knowledge to their students, so too, the counselors/managers pass on their knowledge of acceptable behavior in society and interpersonal skills to the Institute's residents.

4. Voluntary receipt of services is not indicative of managerial status.

There is no basis for distinguishing Yeshiva from the instant case, as did the Regional Director, on the grounds that students attend the university "voluntarily," while residents attend the Institute involuntarily because they are institutionalized. Every person availing himself of the Institute's facilities and services does so of his own volition. No one is institutionalized or forced against his will to remain at the Institute.

In any event, this rationale obscures the real issue, the managerial status of the "teachers." Whether the pupils attend class of their own free will or not does not affect the function of the teacher or his relationship to the institution. The purpose of the teacher is to impart knowledge. The managerial status of the teacher in any setting is determined by his authority and not the status of his pupils. Nor is it determined by the reason for the students' quest for knowledge. Assuming, arguendo, that residents are required to attend groups because they cannot function in society, while students at a university attend to further a career, this distinction is not determinative of the teacher's managerial status.

5. The level of knowledge imparted does not affect managerial status.

The Regional Director found that the counselors/managers could not be managerial employees because they teach basic skills as opposed to subjects of higher learning (A.84-85). Yeshiva does not sustain such a conclusion. The discussion of courses in Yeshiva was for the sole purpose of illustrating the professors' power to determine the courses taught, scheduling, availability, and similar matters. See 444 U.S. at 686. The subjects, themselves, were irrelevant and never discussed.

The faculty in Yeshiva determined the courses which would be offered, the times they would be held

and to whom they would taught. Faculty members debated and determined teaching methods, grading policies and matriculation standards. They effectively decided which students would be admitted, retained and graduated. 444 U.S. at 686. Similarly, the Institute's counselors/managers determine the types of services furnished by the Institute, when they would be offered, and to whom they would be available. They debate and determine teaching methods, grading and matriculation standards. They effectively decide which residents will be admitted, retained and graduated. (A.70-71).

It is the authority to make these decisions about the courses which are taught or programs which are offered that determines managerial status. The counselors/managers possess this authority. The Regional Director's adverse determination is arbitrary and prejudicial to the Institute and fails to give deference to the teachings of Yeshiva.

6. Yeshiva does not require a high salary for a finding of managerial status.

The court of appeals further sought to distinguish Yeshiva on the ground that the unit personnel here "work forty hours a week, punch a time clock and are paid between $4

and $8 per hour." (A.10). From this it concluded "they do not exercise the indispensable policy-making role of the Yeshiva faculty" (A.10-11).

Reliance on such hourly compensation falls outside the scope of Yeshiva. There is simply no discussion of this subject in Yeshiva. Indeed, if one follows the court of appeals' reasoning to its conclusion, small companies or institutions with limited financial resources, might not be able to have managerial employees who exercise collegial authority because they did not pay sufficiently high salaries or because their employees were paid on an hourly basis. The Yeshiva decision does not mandate such a conclusion.

7. Yeshiva did not imply that managers must operate without supervision.

The Board and the court of appeals found that, because the Institute supervised the counselors/managers, they were not managerial employees. Yeshiva does not support this interpretation.

According to the Board and court of appeals, effective recommendation and decision-making would require a lack of all central coordination and supervision. Everyone would make decisions independently and no one could oversee the operation of the institution. Under this reasoning, the Board of Trustees, the President,

the four Vice-Presidents and the school deans in Yeshiva were supernumeraries -- the faculty made all the decisions and coordinated all school matters. That was hardly the case.

The University's faculty may have made a substantial number of decisions, but administrators had to coordinate the affairs of the University and its component colleges. Indeed, Yeshiva University had an extensive administrative complement resulting from its many schools. The fact that a dean or other official coordinated or supervised did not detract from the faculty's authority.

This Court did not find the faculty members managerial because

they operated without supervision or order. Rather, this Court found the faculty members to be managerial because they effectively made recommendations which were generally followed. 444 U.S. at 688 & n.27. Chaos is not the sina qua non of managerial status under Yeshiva.

8. Administration's approval of manager's decisions does not destroy managerial status.

The Board, with the court of appeals' acquiescence, reasoned that because the Executive Director approved the counselors'/managers' decisions or recommendations he retained ultimate authority, which precluded a finding of managerial status. Under this reasoning, any time a counselor's/manager's recom-

mendation received administration's backing, the decision would be removed from the category of "management decision" or "effective recommendation."

This interpretation of Yeshiva is clearly erroneous. The Court did not put such arbitrary boundaries on a manager's authority. Yeshiva does not require that the manager's authority be final. Similarly, the decision does not suggest that administration's acquiescence or approval destroys its character.

On the contrary, this Court pointed out in Yeshiva that "the relevant consideration is effective recommendation or control rather than final authority." 444 U.S. at 683

n.17. This Court further observed that ultimate authority is not a prerequisite to managerial status as "every corporation vests that power in its board of directors." Id. at 685 n.21.

9. Supervisory characteristics are not necessary to a finding of managerial status.

The Regional Director, with the court of appeals' approval, determined that the counselors/managers did not exercise sufficient supervisory authority to consider them managerial employees (A.11, 89-91). Such a finding is erroneous and contrary to Yeshiva.

This Court in Yeshiva specifically stated that it was not relying on the faculty's supervisory charac-

teristics in order to find that the faculty were managerial employees. 444 U.S. at 686 n.23. The Board and court of appeals erred in considering the counselors'/managers' supervisory indicia. The counselors/managers were managerial employees, even if, they possessed no supervisory authority.

CONCLUSION

The decision of the court of appeals rests on reasoning that, if left standing, would deny the teachings of Yeshiva to managerial employees outside a university setting. Further, it would require the satisfaction of additional criteria, not contemplated by Yeshiva, before a finding of managerial status could be made.

For the reasons set forth herein, a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 9, 1984

APPENDICES

National Labor Relations Act. 29 U.S.C. §§151-168 (1976)

Section 2(3) 29 U.S.C. §152(3)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at

his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7, 29 U.S.C. §157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual

aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

Section 8(a)(1) and (5), 29 U.S.C. §158(a)(1) and (5)

§158. (a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10(e), 29 U.S.C. §160(e)

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appro-

priate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency,

and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of January, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JAMES L. OAKES,

HONORABLE RICHARD J. CARDAMONE,

Circuit Judges.

NATIONAL LABOR RELATIONS BOARD,	:	
Petitioner,	:	83-4129
-against-	:	
BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, INC.,	:	
Respondent.	:	

Petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard

on the transcript of record from the National Labor Relations Board, and was argued by respondent.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition for enforcement of the order of the National Labor Relations Board is granted.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. The responsibilities of the Institute's counselors fall far short of that "absolute" authority over academic matters on which the Supreme Court relied in applying the managerial exclusion to the faculty in NLRB v. Yeshiva University, 444 U.S. 672, 686 (1980). There, the relevant bargaining unit consisted of all full-time faculty, including Assistant Deans, senior professors and department chairmen. Here, the unit was composed of employees who work forty hours a week, punch a time clock and are paid between $4 and $8 per hour. Collectively, they do not exercise the indispensable policy-making role of

the Yeshiva faculty. On the contrary, they operate under the close supervision of, and pursuant to administrative directives issued by, the executive director of the Institute.

2. The Institute has failed to point to concrete changes in the counselors' job responsibilities since Yeshiva which would qualify them as managerial. Both the change in job title, and the executive director's general assertions of expanded duties, are refuted by the minutes of the staff meetings. These are replete with unilateral announcements by the director of policy changes, hirings, and the like. The conflict of interest concerns which troubled the Yeshiva court are minimal here, because the management does not rely nearly so heavily upon the professional judgment of the counselors.

3. Respondent's other contentions are equally without merit.

4. Accordingly, the petition for enforcement of the Board's order is granted.

/S/ Irving R. Kaufman
IRVING R. KAUFMAN

/S/ James L. Oakes
JAMAS L. OAKES,

/S/ Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judges.

264 NLRB 114

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 29

BROOKLYN PSYCHOSOCIAL
REHABILITATION INSTITUTE,
INC.

Case
29-CA-8100

and

DISTRICT 1199, NATIONAL
UNION OF HOSPITAL AND
HEALTH CARE EMPLOYEES,
RETAIL, WHOLESALE DE-
PARTMENT STORE UNION,
AFL-CIO

September 27, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

Upon a charge filed on June 19, 1980, by District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, herein called the Union, and duly served on Brooklyn Psychosocial

Rehabilitation Institute, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on July 31, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 16, 1980,

following a Board election in Case 29--RC--4812, 1/ the union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about June 26, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the

1/Official notice is taken of the record in the representation proceeding, Case 29--RC--4812, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F. Supp. 573 (D.C. Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

exclusive bargaining representative although the Union has requested and is requesting it to do so. On September 4, 1980, Respondent filed its answer to the complaint and on May 6, 1982, filed an amendment to its answer admitting in part, and denying in part, the allegations in the complaint.

On June 14, 1982, counsel for the General Counsel file directly with the Board a Motion for Summary Judgment. Subsequently, on June 25, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On July 8, 1982, the General Counsel filed an amendment to

the Motion for Summary Judgment. Respondent thereafter filed a response to the Notice to Show Cause and a Cross-Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

In its answer and amended answer to the complaint, in its Cross-Motion for Summary Judgment, and in its response to the General Counsel's

Motion for Summary Judgment, Respondent attacks the appropriateness of the unit and, consequently, the validity of the certification of the Union as the exclusive bargaining representative of the employees in the appropriate unit. In addition, Respondent contends that special circumstances exist in this case in view of the fact that at the time the Regional Director issued his Supplemental Decision and Order the full Board had not yet rendered its decisions in Ithaca College, 261 NLRB No. 83 (1982); Thiel College, 261 NLRB No. 84 (1982); and Duquesne University of the Holy Ghost, 261 NLRB No. 85 (1982), for the first time applying N.L.R.B. v. Yeshiva University, 444 U.S. 672 (1980), with

detailed, factual analyses and extended explanations, in which various individuals analogously situated to those here were found to be managerial employees within the meaning of Yeshiva, and that those decisions should be followed in the instant matter and Respondent's counselors/managers be found managerial employees, since they substantially determine the program of an institute dedicated to the emerging discipline of psychosocial rehabilitations.

Respondent contends that the Board decisions in Duquesne University, Thiel College, and Ithaca College should be followed in the instant matter and that the counsel-

ors/managers in issue exercise comparable authority in their unique circumstances, inasmuch as they decide or make effective recommendations in virtually all key areas identified by Yeshiva, and, in addition exercise substantial authority over matters outside the academic sphere.

While we agree that our intervening decisions in Ithaca College, Thiel College, and Duquesne University constitute sufficient "special circumstances" to warrant review of the determination made in the representation proceeding concerning the alleged managerial status of counselors/managers, we also find that such cases contained factual situations

which were very similar to those in Yeshiva, and required the same findings. Upon review, however, we here reaffirm the determination made in the representation proceeding.

In Yeshiva the Supreme Court held that the full-time faculty members therein were managerial employees excluded from the coverage of the Act. The Court found that the faculty effectively determined the curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules, and that the faculty's authority extended beyond strictly academic areas; i.e., hiring, tenure, sabbaticals, terminations, and promotions. Finally, the Court found that, although the

administration retained the power to make final decisions, the overwhelming majority of faculty recommendations were followed.

In Ithaca College the Board dismissed the petition seeking to represent a unit of all full-time faculty. The Board found that the faculty at Ithaca possessed and exercised authority similar to that of the faculty in Yeshiva. It noted the faculty's authority to formulate and effectuate policies for their respective schools, including course offerings, class size, credit hours, teaching assignments, admission standards, academic standing, examinations, grading, and graduation requirements. Additionally, the Board noted that the faculty

possessed authority in the hiring of faculty, including deans, the tenure of the faculty, and an effective voice in budgetary matters and facilities planning.

In Thiel College the Board held that the faculty made decisions and effective recommendations in the overwhelming majority of critical areas relied on by the Supreme Court in Yeshiva. The Board noted that the faculty constitution and the faculty bylaws authorized the professors to play such role, and that the record established that, through the faculty council, the faculty executive committee, and other faculty committees, such power was actually exercised. Moreover, the Board noted that the faculty did not

have professional interests separate from those of its employer, and that it necessarily played a large role in operating the college.

In Duquesne University the Board dismissed a petition seeking a unit of all full-time faculty at the School of Law. The Board held that the managerial authority possessed by the faculty in the School of Law was nearly identical to that possessed by the faculty in Yeshiva in such critical academic matters as curriculum, grading systems, and admission and matriculation standards. And, as in Yeshiva, the faculty exercised authority in nonacademic matters, including decisions concerning hiring and tenure.

The record of the prior representation proceeding, which is before us, shows that Respondent filed a request for review of the Regional Director's Decision and Direction of Election in Case 29--RC-4812, which the Board on April 30, 1980, by telegraphic order, denied as it raised no substantial issues warranting review. Subsequently, Respondent filed a motion for rehearing, reconsideration, and reopening of the record in light of the Supreme Court's decision in Yeshiva. On February 17, 1981, the Regional Director issued an order reopening hearing and a notice of hearing in Case 29--RC-4812 deeming additional information necessary with regard to the management status of the unit

employees. On November 4, 1981, following the reopened hearing, the Regional Director issued a Supplemental Decision and Order and, on March 12, 1982, the Board denied Respondent's request for review of the Regional Director's Supplemental Decision and Order.

We find no basis for disturbing the findings of the Regional Director in Case 29--RC--4812. Moreover, we note that the issue of the application of Yeshiva was fully litigated in the representation proceeding and that Respondent's reliance on Ithaca College, Thiel College, and Duquesne University is misplaced inasmuch as those cases were clearly similar to Yeshiva, and Respondent has failed to show how the faculty in this proceed-

ing exercises comparable authority in making academic as well as nonacademic policy.

Moreover, Respondent has failed to offer evidence to refute the findings of the Regional Director in his Supplemental Decision and Order, that Respondent is primarily run by its administration, and that whatever independent decisionmaking power the counselors possess is related chiefly to the discharge of their professional duties, and that the counselors are not involved in drafting budget or grant proposals, are not involved in decisions regarding how many members/residents should be admitted to the facilities, or how Respondent should be generally organized or structured.

Finally, we find that by its arguments propounded in its response to the Notice To Show Cause and in support of its Cross-Motion for Summary Judgment Respondent is attempting to relitigate the same issues which it raised and litigated in the prior representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. 2/

2/See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69 (c).

All issues raised by Respondent in this proceeding were or could have litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any additional special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issues which are properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Cross-Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

The Respondent, Brooklyn Psychosocial Rehabilitation Institute, Inc., is a nonprofit corporation duly organized under, and existing by virtue of, the laws of the State of New York. At all times material, Respondent has maintained its principal place of business at 3 Lafayette Avenue, in the Borough of Brooklyn, City and State of New York, herein called the Lafayette Center, and a place of business at 50 Nevins Street, in the Borough of Brooklyn, city and State of New York, herein called the Boerum Hill facility,

where it is engaged in operating a community residence for former mental patients and a psychosocial rehabilitation program to deinstitutionalize and normalize patients to allow them to return as functioning members of society, and in providing psychosocial services and related services.

At all times prior to January 1, 1980, Brooklyn Psychosocial Rehabilitation Institute, Inc., a New York corporation, and Boerum Hill Rehabilitation Residence, a sole proprietorship, had been affiliated business enterprises with common officers, ownership, directors, management, and supervision; had formulated and administered a common labor policy affecting employees of said operations; had shared common premises and

facilities; had provided services for and made sales to each other; had interchanged personnel with each other; and had held themselves out to the public as a single integrated business enterprise. By virtue of the foregoing operations, Brooklyn Psychosocial Rehabilitation Institute, Inc., and Boerum Hill Rehabilitation Residence constitute a single integrated enterprise and a single employer within the meaning of the Act.

On or about January 1, 1980, the operations of Brooklyn Psychosocial Rehabilitation Institute, Inc., and Boerum Hill Rehabilitation Residence were combined to form one organization, Brooklyn Psychosocial Rehabilitation Institute, Inc., which, since

said date has been, and continues to be, engaged in the same business operations, at the same locations, and providing the same services.

During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business, derived gross annual revenues therefrom in excess of $1 million and purchased and caused to be delivered to Boerum Hill and the Lafayette Center foodstuffs and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were delivered to Boerum Hill and the Lafayette Center in interstate commerce directly from States outside the State of New York and from other

enterprises located in the State of New York, each of which other enterprises had received said goods and materials in interstate commerce directly from States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor

organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9 (b) of the Act:

> All technical employees including counselors employed by the Employer at the Brooklyn Psychosocial Rehabilitation Institute and at the Boerum Hill Rehabilitation Residence, exclusive of all housekeeping employees, food service employees, maintenance employees, elevator operators, clerical employees, professional employees and all other employees, guards and all supervisors as defined in Section 2 (11) of the Act, constitute a unit appropriate for the the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. The certification

On April 30, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 29, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 16, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9 (a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about May 28 and June 25, 1980, and at all times

thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 26, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 26, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate

unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of

certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Brooklyn Psychosocial Rehabilitation Institute, Inc., is an employer engaged in commerce within

the meaning of Section 2 (6) and (7) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. All technical employees including counselors employed by the Employer at the Brooklyn Psychosocial Rehabilitation Institute and at the Boerum Hill Rehabilitation Residence, exclusive of all housekeeping employees, food service employees, maintenance employees, elevator operators, clerical employees, professional employees and all other employees, guards and all supervisors as defined in Section 2 (11) of the

Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Since May 16, 1980, the above-named labor organization has been and now is the certified exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing on or about June 26, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and

is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as

amended, the National Labor Relations Board hereby orders that the Respondent, Brooklyn Psychosocial Rehabilitation Institute, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All technical employees including counselors employed by the Employer at the Brooklyn Psychosocial Rehabilitation Institute and at the Boerum Hill Rehabilitation Institute Residence, exclusive of all housekeeping employees, food service employees, maintenance employees, elevator operators, clerical employees, professional employees and all other employees, guards and all supervisors as defined in Section 2 (11) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization

as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its places of business at 3 Lafayette Avenue and at 50 Nevins Street in the Borough of Brooklyn, city and State of New York, copies of the attached notice marked "Appendix." 3/ Copies of said

3/In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

September 27, 1982

John R. Van de Water,
Chairman

John H. Fanning,
Member

Howard Jenkins, Jr.,
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

D--9662

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store union, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All technical employees including counselors employed by the Employer at the Brooklyn Psychosocial Rehabilitation Institute and at the Boerum Hill Rehabilitation Institute Residence, exclusive of all housekeeping employees, food service employees, maintenance employees, elevator operators, clerical employees, professional employees and all other employees, guards and all supervisors as defined in the Act.

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, INC.

(Employer)

Dated----------By----------

(Representative)

(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212--330--2862.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 29

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, INC.[1/]

Employer

and

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE DEPARTMENT STORE UNION, AFL-CIO

Petitioner

Case No. 29-RC-4812

SUPPLEMENTAL DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Michael Visovsky, Jr., a hearing officer of the National Labor Relations Board. On March 24,

1/The name of the Employer appears as amended at the hearing.

1980, the undersigned Regional Director issued a Decision and Direction of Election. Thereafter, on April 30, 1981, an election was held; 18 votes were cast for the Petitioner, 7 votes were cast against the Petitioner, and 10 votes were challenged, a number insufficient to affect the results of the election. Accordingly, on May 6, 1980, the undersigned issued a Certification of Representative to the Petitioner in a unit of all technical employees, including counselors, employed by the Employer at the Brooklyn Psychosocial Rehabilitation Institute and at the Boerum Hill Rehabilitation Residence, excluding all housekeeping employees, food service employees, maintenance employees, elevator operators, cleri-

cal employees, professional employees, and all other employees, guards, and supervisors as defined in the Act.

On September 3, 1980, the Employer submitted a Motion For Rehearing, Reconsideration, and Reopening of the Record, requesting the undersigned to re-examine the appropriateness of the certified bargaining unit in light of the recent United States Supreme Court decision in N.L.R.B. v. Yeshiva University.[2/] The Employer contends that because Yeshiva overruled established Board precedent, it should be permitted to reopen the record to present evidence on the

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2/444 U.S. 672 (1980).

managerial status of the unit employees at the time of the original hearing, and on these employees' managerial status since the time of the hearing.3/

On February 17, 1980, the undersigned issued an Order Reopening the Hearing and Notice of Hearing, deeming additional information necessary on the issue of the management status of the unit employees. Pursuant to the Order, the record was reopened

3/At the original hearing, the Employer maintained that the only appropriate unit is that which consists of all employees, including counselors, housekeeping employees, food service employees, maintenance employees, elevator operators, and clerical employees, essentially because all these employees perform counseling functions. The Employer did not contend any employees were managerial employees at that time.

and a hearing was held before William Shuzman, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[4/] the undersigned finds:

1. The hearing officer's rulings made at the reopened hearing are free from prejudicial error and are hereby affirmed.

4/Both the record of the original hearing and the reopened hearing constitute the record in this case. Herein, the original hearing will be referred to as the first hearing, the reopened hearing will be referred to as the second hearing.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. Essentially two issues were raised at the reopened hearing: (1) whether in light of Yeshiva, the unit employees - herein referred to as the counselors - should be found to be managerial employees as of the March 24, 1980 Decision and Direction of Election and (2) whether in light of Yeshiva the counselors became managerial employees some time after March 24, 1980.

1. Status of Counselors Before March 1980.

The Employer contends that in view of Yeshiva, the counselors should be found to be managerial employees as of the initial hearing in March 1980 and therefore excluded from the unit.[5/] The Petitioner, on the other hand, contends the counselors are not managerial employees.

As set forth in the Decision and Direction of Election, the Employer operates two facilities: (1) the Boerum Hill Rehabilitation Residence, which houses former mental health

5/The certified unit consists only of counselors. Therefore, by contending that the counselors are managerial employees and should be excluded from the unit, the Employer is actually seeking to have the Certification of Representative revoked.

patients, and (2) the Lafayette Center which is an outpatient facility that provides social, vocational, training or rehabilitative services for approximately two-thirds of the residents of Boerum Hill. Irving Link is the Executive Director of the Employer, Dr. Karl Easton is the Medical Director of the Employer, Connie Newman is the Director of Lafayette Center, and Roger Newman is the Residence Manager at Boerum Hill.[6/] These individuals constitute what is herein referred to as the Administration.

6/At the time of the first hearing, Irving Link was the Director of the Lafayette Center, Dr. Easton was the Executive Director of the Employer; Barbara Levi was the Director of Boerum Hill, and Connie Newman was a counselor.

There is also a Board of Directors which assumes the legal responsibility for the overall development of the organization and for the general policies.

As of March 1980, the Employer employed approximately 22 counselors. Eight of the counselors worked at the Boerum Hill facility; about fourteen counselors worked at the Lafayette Center. These counselors, like the other employees of the Employer,[7/] punched a time clock and were paid on an hourly basis. Their wages ranged from about $3.10 an hour to about

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7/The Employer also employed housekeeping employees, food service employees, maintenance employees, elevator operators, and clerical employees.

$5.53 an hour; one counselor was paid at the rate of $8.17 an hour. The counselors received similar fringe benefits, holidays, overtime pay, and personnel leave to those received by all the other employees. Irving Link and Dr. Easton formulated the rates of pay, fringe benefits, and grievance procedure for all the employees, including the counselors. All the employees, including the counselors, were evaluated according to the same evaluation form. These forms rated the counselors on such items as punctuality, attendance, and use of supervision, among other things.

There were no educational requirements for the counselors; they only had to be able to read and write. In fact, Link testified at

the first hearing that he could take someone out of grammar school or kindergarten and hire that person as a counselor. None of the counselors was licensed or certified as occupational therapists, social workers or psychotherapists, but about eight had graduate degrees and 12 had undergraduate degrees. Three counselors had no educational degrees at all. Some of the counselors were former residents of Boerum Hill. Once hired as counselors, however, these former residents were treated the same as the other counselors and received the same wages and benefits.

The record of the first hearing reflects that counselors at the Lafayette Center and counselors at the Boerum Hill facility performed some-

what different functions. However, counselors at both facilities led structured groups, such as dance therapy and art groups, set up a member's program,[8] acted as role models for the members/residents, helped repair various things, cleaned up messes of members/residents, helped operate the elevator, worked with outside agencies such as the Social Security Administration and Medicaid, filled out discharge summaries,[9] evaluated members/residents as to

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8/"Members" are those persons who receive services at the Lafayette Center; "residents," referred to below, are those persons who reside at the Boerum Hill facility.

9/The record established that there are written criteria for discharges from Boerum Hill that must be filed with the New York Office of Mental Health.

their need for hospitalization, and handled their own caseloads. With regard to their caseloads, counselors handled their own caseloads. With regard to their caseloads, counselors had to prepare activity schedules, treatment plans, semi-monthly reports, and attendance and performance records for the members/residents they were responsible for.

As of March 1980, the counselors were supervised by Link, Levi, and Easton. Link testified at the first hearing that the counselors performed their duties "under his supervision." Thus, he testified that when a counselor works with a person or group, that counselor has to come to him to ask what to do next or how to do it.

For example, Link explained, the dance therapy counselor "is not at liberty to devise and develop her own programs without discussing it with me, without having my approval."10/ Link stated that the counselor has primary responsibility for setting up the member's program, but the counselor is then supervised by Link and Link makes revisions as frequently as necessary. Link further stated he specifically discusses with the counselors each person they are respon-

10/Transcript of the first hearing, page 134.

Link also stated that the counselors who does personal adjustment training develops the education program for any individual under his supervision. In fact, he testified the program was changed recently at his instruction.

sible for.[11/] Link meets with each counselor for his or her supervision about four hours a week. When a counselor has a problem with an outside agency, he or she goes to his supervisor about it. Also, the supervisors make the final decisions on whether an individual should be hospitalized.

At the first hearing, Link further stated that he coordinates each of the programs (groups) and basically devises the schedule of the group with input from the staff. Link

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11/Link also testified that the decision of whether a resident/member should be moved from one type of activity to another is made by the counselor under his supervision. A counselor at the first hearing stated that Link reviews whatever work she does.

testified he is not aware of any counselors ever rescheduling something on their own without his approval.

The record of the first hearing also reflects that counselors met once a week as a group with Link and/or Levi. Link testified that the purpose of these weekly meetings was to discuss the members/residents and how they were functioning, and to present particular case studies. The record also reveals that at these meetings the counselors received information pertaining to administrative changes and procedure, and presented whatever grievances or prob-

lems they may have.12/

The testimony at the first hearing revealed that counselors do not hire or fire other employees and do not evaluate other employees' work. Indeed, the record indicated that these functions were performed by supervisors.

At the second hearing, further testimony was presented concerning the duties of the counselors as of

12/The other employees of the Employer have similar weekly meetings with the Administration. For example, for one hour a week the housekeeping employees and the food service employees meet with someone from the Administration.

March 1980.[13/] Link and Newman, who by the time of the second hearing was Director of the Lafayette Center, were the only persons to testify. They in essence stated that as of March 1980 the responsibilities of the counselors included: (1) assuming responsibility for crisis intervention; (2) representing the Employer at hearings with outside agencies such as Social Security Administration and Medicaid, in order to obtain

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13/It should be noted that the testimony supplied by the Employer's witnesses at the first hearing regarding the counselor's duties was given in support of its contention that only an Employer-wide unit was appropriate. The Employer's testimony at the second hearing on the counselors' duties was given in support of its contention that the counselors were managerial employees as of March 1980.

funding for particular members or residents; (3) providing basic aids to daily living for members/residents; (4) performing intake interviews at the Lafayette Center; (5) counseling members/residents; (6) running therapy groups; and (7) participating in weekly meetings of counselors. Elaborating on the content of these weekly meetings, Link and Newman testified that the following matters were discussed: the discharge and expulsion of members/residents; the admissions and readmissions of members/residents; the subject matter of the therapy groups; the number of groups a counselor will conduct and what counselors will lead particular groups; the number of members that will attend a group; the

number of times a group will meet; the teaching methods that will be used in the groups; the treatment plans for members;[14] discipline of members; and the ordering of supplies. The meetings were held for about one hour a week.[15]

In addition to the above, Link also testified that counselors made final decisions on matter of admission of members/residents; teaching

14/Treatment plans basically outline the strengths, weaknesses, and problems of a member/resident as perceived by the counselors.

15/The minutes of the meetings held in the first 3 months of 1980 indicate the meetings were conducted primarily to discuss problems the counselors had and information regarding the operation of the facilities - i.e. cancellations of meetings, trips for members, ideas on the integration of Boerum Hill and Lafayette Center.

methods of groups; size of groups; discharge and/or expulsion of members; scheduling of groups; and the treatment plans of members. No administrative approval was required. However, as noted above, the evidence presented at the first hearing indicates that some of these matters, specifically the matters of teaching methods, treatment programs for members, and scheduling of therapy groups, are carefully supervised by members of the Administration. Also, the evidence presented at the second hearing established that pursuant to the requirements of the Office of Mental Health (OMH) and Medicaid, the treatment plans have to be signed by a physician and an approved professional. OMH has its own definition

of who qualifies as an approved professional. The record further revealed that Dr. Easton signed the form as the physician, and a staff member who had a masters in Rehabilitative Counseling signed as the approved professional. As noted above, OMH has similar requirements with regard to the discharge of members/residents. Thus, the discharge summaries that the counselors will fill out must be countersigned by a "qualified person," such as Link.[16/] Similarly, the admissions forms at

16/Link testified, however, that although he must sign these forms, his signature does not signify prior approval of the discharge. Nevertheless, it appears Link's signature indicates at least post-discharge approval.

the Lafayette Center must be co-signed by a psychiatrist. The psychiatrist also reviews the write-up of the admission form after it is written. Link and Newman testified that there are no admission or discharge standards set by the Administration. However, the New York Office of Mental Health has set written criteria for discharge and admissions, which the Employer must adhere to.

The record at the second hearing also established that occasionally counselors were given copies of the Employer's financial statements. These statements contained information on the Employer's expenditures, outstanding debts, and income from Medicaid and other agencies. However, Link stated that the counselors made

no financial decisions, other than deciding as a group, along with the Administration, what supplies to order for the different therapy programs.17/

According to Link, as of March 1980, the Administration decided such matters as the discharge or discipline of counselors, the salaries of counselors, and the break times for the counselors.18/ Newman testified that counselors made recommendations as to the hiring of other counselors and staff members; however, Link

17/Newman also testified that as a counselor she decided what members in her group would receive the $.50 incentive payments they received for attending programs at the Lafayette Center for half of a day.

18/The counselors receive a half hour for lunch.

stated that as of March 1980 counselors could not hire or fire other employees on their own, and the testimony presented at the first hearing supports this statement.

As set forth in the Decision and Direction of Election, and noted above, the Employer is a rehabilitative institute designed to prepare former mental health patients for reentry into society. The evidence established, especially at the first hearing, that all of the employees, including the elevator operators, housekeepers, food service employees, and maintenance employees, are involved in the implementation of the Employer's goals - that is, the rehabilitation of the members/residents so they may function more effective-

ly, in the community. According to the Employer, all the employees at various times perform each others' functions, and most importantly, all of the employees perform counseling for the members/residents, and act as a role models. As the Employer so emphatically emphasized in the first hearing, all the employees operate as "one functioning unit for the socialization and the institutionalization of the residents of the facility, so that these residents can be returned to society as functioning members of society."[19/]

19/Transcript in first hearing, page 106. Link testified that 99 percent of the residents are former patients of psychiatric hospitals.

The Yeshiva decision issued on February 20, 1980, the day the first hearing in this case closed. The Yeshiva decision involved a private university which had 5 undergraduates and eight graduate schools. The Yeshiva University Faculty Association sought to represent a unit of full-time faculty members at 10 of the 13 schools. The United States Supreme Court held that the full-time faculty members were managerial employees and therefore excluded from the coverage of the Act.

Quoting from N.L.R.B v. Bell Aerospace Co.,[20/] the Supreme Court defined managerial employees as those

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20/416 U.S. 267, 283 (1974).

who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."[21/] The Court noted that managerial employees "are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary."[22/] The Court further stated, "Managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management.... [A]n employee must be excluded as managerial only

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21/444 U.S. at 682.
22/Ibid.

if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[23/]

In reaching its decision that the full-time faculty were managerial employees, the Supreme Court found that at Yeshiva the faculty in essence ran the University.[24/] In this regard, the Court found that the Yeshiva faculty made final decisions and effective recommendations in the following areas: (1) curriculum (both course content and scheduling), (2)

23/444 U.S. at 683.

24/The Supreme Court affirmed the decision of the Second Circuit's finding that the Yeshiva faculty are, "in effect, substantially and pervasively operating the enterprise." 444 U.S. 691, quoting from N.L.R.B. v. Yeshiva University, 582 F.2d at 698.

attendance, (3) teaching methods, (4) grading policies, (5) matriculation standards, (6) admission policies, (7) retention policies, (8) graduation standards, (9) size of student body, (10) tuition, (11) location of school, (12) teaching loads, (13) student absence policies, (14) faculty hiring, (15) tenure, (16) sabbaticals, (17) terminations, and (18) promotions. The Court also noted that some of the faculty prepare budget requests which receive "perfunctory" approval from the Dean "99 percent" of the time, and that some department chairmen approve budget allocations "when discretionary funds are available."[25/] The Supreme Court

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25/444 U.S. at 676, n.3.

explicitly found that Yeshiva "must rely on (its) faculty to participate in the making and implementation of (its) policies," and thus the problem of divided loyalty is "particularly acute for a university like Yeshiva."[26/] Indeed, the Court stated, "the faculty's professional interests - as applied to governance at a university like Yeshiva - cannot be separated from those of the institution."[27/]

However, in concluding that the Yeshiva faculty were managerial employees, the Supreme Court emphasized it was not holding that all faculty members are managerial employees and

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26/444 U.S. at 689.
27/Ibid.

thus excluded from the Act's coverage. In fact, the Court stated:

> We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. (Footnotes omitted.)[28/]

In a footnote, the Court further noted, "It is plain, for example, that professors may not be excluded merely because they determine the

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28/Ibid.

content of their own courses, evaluate their own students, and supervise their own research."[29/]

As noted above, the Employer contends that in light of Yeshiva, the Board should find that the counselors as of March 1980 were managerial employees and therefore should be excluded from coverage of the Act. Unlike Yeshiva, which is a very mature university, the Employer is a relatively small rehabilitation center. The evidence shows that the Employer employs only about 65 employees, of which approximately 22 are counselors, and as of March 1980 served only about 200 residents. Fur-

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29/444 U.S. at 690-691, n.31.

thermore, the record indicates the Employer operates more like a health care institution than an educational institution, in that its goals is to rehabilitate persons who require its services because of their particular mental health problems.30/ Unlike at a university where students attend voluntarily to improve or advance their career and educational goals, the members/residents at the Employer's facility attend programs or groups because they cannot yet function normally in society. Unlike at a university, the instant Employer

30/Indeed, in its brief to the undersigned after the first hearing, the Employer contended that it is a health care institution under the Act.

teaches its members/residents only the very basic skills, i.e. how to keep clean, how to clean their rooms, how to go shopping, how to cook, how to find an apartment, how to open up a bank account, and how to fill out an employment application and secure employment, to name a few. The counselors, unlike the faculty members of Yeshiva, are not required to have any particular educational background. Indeed, as noted above, they only must be able to read and write. In the Decision and Direction of Election, I found these employees to be technical, not professional, employees, in part because of their limited educational background. Also, the counselors' responsibilities to the members/residents is in essence no

different than the responsibilities of the Employer's other employees to the members/residents. In fact, as noted above, the Employer emphasized that all its employees are mental health workers, and the elevator operators, housekeepers, maintenance workers, clerical employees, and food service employees, as well as the counselors, are required to serve the Employer's goals by offering advice, guidance, and consultation to the members, and by serving as role models. Certainly, no one would argue that the faculty members at a university can be compared in any way to the university's maintenance workers, clerical employees, or food service employees.

Thus, in light of the above differences, it could be argued that

Yeshiva is not applicable to the situation here.[31] Indeed, the Board noted in Pratt Institute, 256 NLRB No. 175 (1981), that "lower courts in discussing the Yeshiva decision have expressed the belief that Yeshiva was meant to apply to a mature university, where the faculty, acting in a collegial capacity, governed the school in all its major aspects."[32] [footnote omitted] However, assuming without deciding that Yeshiva applies to the instant case, I nevertheless

31/Also, it could be argued that since at the time of the first hearing there was already extensive Board law on the issue of managerial employees, if the Employer believed the counselors were managers, it should have argued this originally, especially since the Yeshiva situation is so different than the Employer's.
32/256 NLRB at slip op. pg. 5.

find, as discussed below, that as of March 1980, the counselors were not managerial employees.

As noted above, the Employer presented evidence that similar to the faculty at Yeshiva, the counselors make final decisions or effective recommendations as to (1) what groups will be offering, (i.e. curriculum), (2) what teaching methods will be used in the group, (3) what members will attend the group, (4) the size of the group, (5) which counselors will lead a particular group, (6) who will be admitted into the facility, (7) who will be discharged or ex-

pelled from the facility,[33] and (8) what supplies shall be ordered for particular groups.[34]

However, contrary to the faculty in Yeshiva, the record also established that the counselors performed their duties under close supervision from their supervisors.[35] Indeed, as

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33/However, as noted above, there are written criteria which must be followed in making decisions regarding admissions and discharges; and both admission and discharge forms are co-signed by "qualified" persons.

34/The evidence established that treatment programs are devised by the Administration.

35/Indeed, in its Request for Review of the Decision and Direction of Election, the Employer stated, "There was no finding that the counselor's exercise of judgment was frequent or significant. Indeed, Link testified that counselors exercised some independent judgment, but ony under his careful supervision. A review of his testimony ... can counselors lead only to the conclusion that any independent judgment exercised by counselors is so limited as to be inconsequential."

noted above, Link, the Executive Director of the Employer, testified that the counselor received about four hours of supervision a week and that the counselor "is not at liberty to devise and develop her own programs without discussing it with me, without having my approval." Link also stated, as noted above, that he coordinates each program or group and devises the scheduling of the group. Furthermore, the testimony establishes that counselors made no final decisions or compelling recommendations regarding financial matters, the hiring or firing of other counselors, promotions or evaluations of other counselors, the salaries of counselors, the scheduling of counselors, the amount to be charged

members/residents (tuition), or the location of the facility.

Thus, unlike Yeshiva, it does not appear here that the Employer is compelled to rely on the "professional" judgment of its counselors. Indeed, the contrary appears to be more the case - i.e. that the Administration takes a very active role in the counselor's performance of their duties and that the counselors do not have absolute control over counseling matters. Moreover, as noted above the staff here, unlike the faculty at Yeshiva, is small, and there are essentially five supervisors for approximately 22 counselors. This fact further indicates that the Employer, unlike at Yeshiva,

is not compelled to rely on the advice, judgment, and recommendations of its counselors.

The record also establishes that the weekly staff meetings, where the Employer argued the "managerial" type decisions were made, only took place for about one hour a week and that the purpose of these meetings was to discuss the progress of the members/-residents and the grievances or problems of the counselors. Indeed, the minutes of some of these meetings fail to establish that few, if any, managerial type decisions were made at the meetings. Rather, the minutes reflect the meetings were held mostly as a means by which the counselors could receive additional guidance and

supervision from the Administration, and general information on the running of the Employer's facility.

Finally, as noted above, the counselors were not required to have any particular educational degrees, punched a time clock, received an hourly wage which for some was only slightly higher than the minimum wage, and performed duties that were in some ways comparable to the duties performed by the Employer's other employees.

Thus, it appears that the counselors made few independent decisions in the performance of their jobs, and to the extent that they did, those decisions related to the counselors own groups and caseloads. Moreover,

it appears that the decisions the counselors made they made according to their own "professional" or technical interests - i.e. their interest in seeing their members/residents improve and acquire skills to enable them to integrate into the community.36/ As the Supreme Court stated in Yeshiva, "professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research.37/

Accordingly, based on the above, noting especially the amount of

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36/Indeed, Link testified that he evaluates the counselors according to how the members for which they are responsible improve in their socialization skills over a certain period of time

37/444 U.S. at 690-691, n.31.

supervision the counselors receive, the limited skills the counselors are required to have, and the insignificant amount of time the counselors allegedly spend on making "managerial" type decisions, I find that the counselors were not managerial employees as of March 1980. I therefore will uphold the Certification of Representative issued May 16, 1980.

2. Statute of Counselors After March 1980.

The Employer in its Motion also contends that since the Certification of Representative, the counselors have acquired added duties and responsibilities, and therefore, in light of Yeshiva, should be considered managerial employees. The Petitioner contends first that any unila-

teral changes in duties and responsibilities of the unit employees since the Certification of Representative are unlawful,38/ and secondly, that even with the alleged changes, the unit employees are nevertheless not managerial employees under Yeshiva.

The record reveals that for the most part the counselors' duties and responsibilities after March 1980 are very similar to their pre-March 1980 duties and responsibilities. Indeed, Newman testified that there is no significant difference between the duties of counselors before and after

38/The Petitioner has in fact filed a charge alleging that the Employer violated Section 8(a)(5) of the Act by making certain unilateral changes in the unit employees' working conditions.

March 1980.39/ According to both Link and Newman, the primary change was that a few months after March 1980 the counselors began working at both the Lafayette Center and the Boerum Hill facility, and as a result needed to know more about the overall organizational structure of the Employer. Before, the counselors only worked at one or the other of the Employer's facilities.

Link and Newman also testified that since March 1980, the counselors assumed increased responsibilities in

39/In the summer of 1980, the Employer changed the title of the unit employees from that of "counselor" to that of "manager," specifically, "Senior Managers" and "Floor Managers." For the sake of consistency, this Decision will continue to refer to the unit employees as counselors.

the areas of admissions and finances. Specifically, with regard to admissions, they stated that counselors now handled admissions at Boerum Hill, where before they did not, and they had more responsibility regarding admissions at the Lafayette Center. As for the matter of finances, the testimony revealed that since March 1980 the counselors more regularly received copies of the Employer's financial statements and formed a Finance Committee which was looking into ways in which to obtain more funds for the facilities by ordering a directory. However, the financial/budget reports for the Employer were still prepared by the Employer's accountant and submitted to the Board of Directors. Also, only

Link met with the OMH representatives regarding the Employer's grant proposal.40/

The record further revealed that beginning in August and September 1980, the counselors received greater responsibility in matters concerning themselves and other employees. Thus, Link testified that beginning in the late summer of 1980, counselors began making decisions regarding the hiring and firing of other counselors, the hiring and firing of housekeepers, and the evaluating of both housekeepers and clerical employees. All the housekeepers are

40/There is no evidence that counselors had any input into the preparation of the grant proposal.

former residents; eight out of thirteen clericals are former residents. Link further stated that since July 1980 counselors began determining their own hours of work and time off, without needing approval from the Administration. The only requirement was that the counselors notify the other counselors of any schedule changes at the weekly staff meetings. However, contrary to the testimony, the minutes of the staff meetings introduced as evidence indicate that the opposite is true - i.e. that the counselors cannot change their schedules without the Administration's approval, just like they could not change them prior to March 1980. Thus, the minutes of the September 19, 1980 meeting explain that a

counselor left a letter for Link stating he was changing his schedule to eliminate his evening hours. After noting that Link read the counselor's letter to the group, the minutes state, "Policy has always been to negotiate schedule changes with administration rather than to treat them as a fait accompli .... Lee (the counselor) stated ... (h)e worked out what he felt was a reasonable schedule given the fact he cannot work evenings and presented it to Irv (Link). Irv acknowledged from personal experience that the institute's requirements are extensive; however, one's place of employment has its requirments, too, and he did not feel he could accept unilateral changes of this sort .... Under no circumstances

should anyone change their schedule unilaterally." Also, the minutes of the June 12, 1980 meeting indicate that counselors do not have much control over their schedules. For instance, the minutes of this meeting explain that when counselors raised the matter of compensatory time, "Irv said staff are expected to follow their regular schedules unless they have administrative approval to make a change." The minutes further state, "Irv said the policy has been that both compensatory time and overtime exist only with administrative approval. He (Link) is now eliminating compensatory time and authorizing overtime only, and that

only when he approves it officially."40/

Link also testified that since October 1980 counselors began determining starting salaries for newly hired counselors, and that on occasion he did not learn of what the quoted salaries were until after the person was already hired. However, the record is unclear as to whether the quoted salaries were final decisions or could be overruled by a

40/The minutes of the June 12, 1980 meeting also state that counselors complained about being docked unfairly. The policy was to allow a 10 minute grace period before a deduction is made. A counselor suggested having a 10 minute grace period at both ends of the day. The minutes state, "Irv agreed this was the easiest way and henceforth there will be a 10 minute grace period either way."

member of the Administration. Thus, when Link was asked if he or anyone in Administration had authority to overrule the salary figure quoted, and possibly lower it, Link stated, "It's very difficult to answer. There are no written guidelines stating what shall take place."41/

Link also testified that in the summer of 1980 counselors began having input into decisions pertaining to such personnel matters as vacations, holidays, personnel leave, and health plan benefits. At that time an Issues Committee was established consisting of ten counselors, one alternate, and Administrative person-

41/Transcript of second hearing, page 629.

nel. This committee began devising new personnel policies, but by the time of the second hearing, no final decisions had been made on these matters. The staff also established a Program Committee around this time. Link testified this committee makes recommendations to the rest of the staff regarding the additions of groups and activities at the Boerum Hill facility and on weekends.

Similar to the counselors' pre-March 1980 duties, their post-March 1980 duties involved making purchases of supplies for the counselors groups and/or programs. The record also showed that around October 16, 1980 the counselors participated in a decision to purchase a pool table, a

ping pong table, and several tables and chairs in order to provide additional recreational activities for the members/residents.

There was also evidence presented that following March 1980 counselors continued their practice of deciding, as a group, what groups/programs to offer, when the groups will be offered, who will lead the groups, how many members will be in the groups, and what teaching methods will be used in the groups. Again, the testimony indicated the counselors made these decisions without needing approval from the Administrator. However, according to the minutes of the staff meetings, it appears these decisions are subject

to extensive supervisory input and often supervisory approval.

Thus, the minutes of the July 10, 1980 meetings state, "Irv (Link) would approve any staff members co-leading (a group) if they wish," and the minutes of the September 18, 1980 meeting state, "Bea again expressed interest in running the Garden Group. Irv told her to check with Connie (then Assistant Director of the Lafayette Center), and, if okay with her, its okay with him." Indeed, the minutes for the entire period from March 1980 to March 1981 indicate that the subject matter of most of the meetings concerned the presentation of case studies, the airing of counselors' personal and work related

problems, and the sharing of information relating to the Employer.42/

There was no additional evidence presented at the second hearing regarding the supervision and/or evaluation of the counselors other than the testimony that now there were two classifications of counselors - senior "managers" and floor "managers" - and the senior managers evaluated the floor managers. According to Link the senior managers are

42/For example, the minutes reflect that announcements were made about upcoming events at the Employer such as the Carnival or other parties, that the staff discussed the problem with missing files, etc., the need for referrals to their groups, and the arrival of new staff members, and that the Administration would advise the counselors of new rules and regulations or problems with funding.

all those employees, with the exception of one, who held the position of counselor when the title was changed to "manager." Link testified that Newman and he evaluated the senior managers. There was no evidence to contradict the record in the first hearing that counselors received at least 4 hour of supervision a week and Link supervised the handling of the counselors' caseloads.

Finally, there is evidence at the second hearing that counselors participated in a decision to keep the Lafayette Center open for certain hours in the evening, and that when no administrative person was around, the counselors on a rotating basis were responsible for the building.

Again, assuming that Yeshiva is applicable to this case, I find that the counselors did not become managerial employees after March 1980.43/ Admittedly, there is evidence that since March 1980 the counselor's duties expanded to include participation in decisions as to the hiring, firing, and evaluating of other counselors and employees. Duties also were slightly expanded with regard to the admissions of members/residents into the Employer's facilities; the purchase of additional supplies for the Employer; the more regular receipt of the finance reports; the

43/The Employer does not contend the counselors are supervisors under the Act.

Employer's personnel policies, and the hours of the facilities.

I find, however, the evidence shows that these duties, like the counselor's other duties, are performed in conjunction with extensive supervisory knowledge and/or participation. Indeed, at the second hearing, the Employer did not dispute the strong evidence presented at the first hearing that Link discusses with each counselor the member/resident for whom he or she is responsible, and that Link generally oversees the counselors' work. Also, the evidence of the counselor's post-March 1980 duties indicates that in making decisions on admission and/or discharge of members, counselors must adhere to rules and regulations set

forth by OMH and Medicaid, and must have their decisions co-signed and at times reviewed by a "qualified professional." Finally, the record of the second hearing presents some very conflicting evidence as to the extent of independence the counselors have in decisions concerning their own employment conditions.

As noted above, the Supreme Court in Yeshiva determined that faculty members were managerial employees because they in essence ran the university and possessed such extensive decision-making authority in matters of university governance that the university had to rely on them "to formulate and apply crucial policies constrained only by necessarily

general institutional goals."44/ Such is not the case here. Rather, the above evidence indicates the Employer is primarily run by the Administration, and that whatever independent decision-making power the counselors possess related chiefly to "the discharge of (their) professional duties."45/ The counselors are not involved in drafting budget or grant proposals, although they regularly receive financial reports, and do not appear to be involved in decisions regarding how many members/residents should be admitted at the Employer's facilities,46/ or how the Employer

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44/444 U.S. at 690.
45/Ibid.
46/In fact, according to Link, counselors are not told what percent of applicants are rejected from Boerum Hill.

should be generally organized or structured. Moreover, the meetings at which the alleged managerial decisions are made take place for only about an hour and a half a week, and from the minutes, it appears that most of that time is spent on clearly non-managerial type discussions.

Accordingly, based on the above, I find that the counselors are not managerial employees and the Certification of Representative issued on May 16, 1980 is still valid.

REQUEST FOR REVIEW

Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by November 17, 1981.

Dated at Brooklyn, New York, this 4th day of November 1981.

/S/ Samuel M. Kaynard
Samuel M. Kaynard
Regional Director
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11241

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 29

BROOKLYN PSYCHOSOCIAL
REHABILITATION INSTITUTE,
INC./BOERUM HILL
REHABILITATION RESIDENCE
Employer

Case No.:
29-RC-4812

and

DISTRICT 1199, NATIONAL
UNION OF HOSPITAL AND
HEALTH CARE EMPLOYEES,
RETAIL, WHOLESALE DE-
PARTMENT STORE UNION,
AFL-CIO
Petitioner 1/

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing

1/The names of the parties appear as amended at the hearing.

was held before Michael Visovsky, Jr., a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdic-

tion herein. 2/

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Two issues were raised at the hearing concerning the scope of

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2/At the hearing, the parties stipulated and I find that Brooklyn Psychosocial Rehabilitation Institute, Inc. and Boerum Hill Rehabilitation Residence share common management and labor relations policy and jointly operate the entrerprise involved herein.

the unit sought and the voting eligibility of certain individuals employed by the Employer.

The Petitioner seeks to represent a unit of professional and technical employees consisting of counselors. In the alternative, it seeks an election in separate professional and technical units. The Employer maintains that the combined unit and alternative units sought by the Petitioner are clearly inappropriate. In its view, the only appropriate unit is that which consists of all employees, including all counselors, housekeeping employees, food service employees, maintenance employees, elevator operators and clerical employees.

Approximately fifteen individual who are employed by the Employer are members of the Employer's day program and reside at the Employer's residential facility. The Petitioner, contrary to the Employer, maintains that these individuals should not be eligible to vote.

There appears to be no history of collective bargaining for any of the employees herein.

Brooklyn Psychosocial Rehabilitation Institute, Inc., and Boerum Hill Rehabilitation Residence, herein jointly referred to as the Employer, jointly operate a community residence for former mental patients and a psychosocial rehabilitation program for the de-institutionalization and nor-

malization of former mental patients. These services are essentially provided at two facilities in Brooklyn, New York located at 50 Nevins Steet, herein called the Boerum Hill facility, and at 3 Lafayette Avenue, herein called the Lafayette Center. The record reflects that the distance between the two facilities is approximately one city block.

Approximately 200 individuals reside at the Boerum Hill facility. Most of these individuals are recently institutionalized former mental patients. The Lafayette Center is an out-patient facility licensed by the New York State Office of Mental Health to provide social, vocational, training or rehabilitative services in a

day training program. Approximately, two-thirds of the residents of the Boerum Hill facility are participants in programs at the Lafayette Center.

The record reflects that the Employer employs approximately 65 employees. There are approximately 23 employees referred to as counselors, 14 housekeeping employees, 7 clerical employees, 6 food service employees and 4 elevator-operators. The remaining employees include one bookkeeper, 2 elevator operators who also function as "night counselors," and 2 clerical employees and 1 housekeeping employee who perform functions in the Employer's "Aids to Daily Living" program. Approximately 15 counselors primarily work at the Lafayette

Center, along with 1 housekeeping employee and 1 clerical employee who performs bookkeeping duties. The record reflects that the remaining employees primarily work at the Boerum Hill facility. The employees at the Lafayette Center work directly under the supervision of the director, Irving Link. The employees at the Boerum Hill facility work directly under the supervision of the director Barbara Levi. Both Link and Levi are social workers certified by the State of New York.

Approximately 35 or 65 individuals employed by the Employer were, at one time, or are, at present, residents of the Boerum Hill facility. Only 15 of these individuals reside at

the Boerum Hill facility at the present time. Most of the Boerum Hill facility residents who work for the Employer also receive rehabilitation services. Although the record reflects that the 15 residents include individuals categorized as counselors, housekeeping employees, elevator operators, maintenance, food service and clerical employees, it does not indicate what the specific breakdown is in each category. The record is clear, however, that a substantial number of the residents are not employed as counselors.

The record reflects that all counselors are regularly scheduled to work a 40 hour week. In contrast, most of the housekeeping employees are

scheduled to work less than 15 hours per week. Similarly, most of the clerical and elevator operator employees work less than 25 hours per week. Most of the remaining employees are scheduled to work from approximately 30 to 40 hours each week.

The record reflects that all full-time employees receive similar fringe benefits, including hospitalization insurance, holidays, overtime pay, and personal leave. While the counselors receive two weeks vacation for each six months of employment, the balance of the staff receives one week vacation for the same period of employment. Although all employees are paid on an hourly basis, evidence submitted by the Employer reflects sig-

nificant differences in wage rates for employees in the various categories. For instance, of all employees called counselor, only 3 are paid less then $3.85 per hour. Most of the counselors earn $4.00 to $8.00 per hour. In contrast, all but one of the housekeeping employees is paid the hourly rate of $3.10. Similarly, the majority of food service, elevator operator and clerical employees are paid hourly rates from $3.10 to $3.65. The elevator operators who function as night counselors and the clerical and housekeeping employees who participate in the Employer's "Aids to Daily Living" program are paid at hourly rates from $3.10 to $3.30. The wages rates and fringe benefits for all employees are

formulated by Link, Levi, and Dr. Karl Easton, the Executive Director and psychiatric consultant of the Employer.

All employees share several common terms and conditions of employment. For instance, all employees punch a time clock and are evaluated using the same evaluation form. The use of the evaluation form was only recently instituted at the Lafayette Center. All employees are required to attend a monthly meeting of all employees. There is, however, a separate meeting of all counselors on a weekly basis during which case presentations are discussed. There is also a separate meeting of housekeeping and food services employees on a

weekly basis. All employees at both facilities utilize a message book; it is essentially a method used by the Employer to communicate with staff about matters related to resident care.

Several significant issues were raised at the hearing concerning the criteria utilized by the Employer for hiring counselors, the educational training of counselors who are currently employed, and the functions and duties of counselors as compared to the functions and duties of all other employees.

With respect to the criteria utilized by the Employer for hiring counselors, the record is clear that no state or federal law requires the

Employer's counselors to have undergraduate or graduate degrees. Although there is some evidence that the Employer advertised for individuals with undergraduate or graduate degrees in the past, there is no evidence to indicate that this is required at the present time. The critical criterion is the personality of the applicant and whether he or she can relate to the members of the Lafayette Center program and the residents of Boerum Hill. The record reflects, however, that at one time a counselor's rate of compensation was determined, in part, by whether he or she had an undergraduate or graduate degree.

At present, the Employer employs approximately 8 counselors with

graduate degrees, 12 counselors with undergraduate degrees, and 3 counselors who do not have undergraduate or graduate degrees. At least one of the latter group of counselors is working toward his undergraduate degree in psychology. Several counselors with undergraduate degrees are in educational programs leading to a masters degree. No counselors are licensed or certified as occupational therapists, social workers or psychotherapists. Those counselors who have masters degrees have specialized in behavioral science fields such as dance therapy, art therapy, psychology, rehabilitation counseling and education.

The duties of the counselors differ in certain respects depending upon the facility. At the Lafayette Center, the counselors are involved in leading structured group programs including scheduled groups involving interpersonal skills, career counseling, personal adjustment training, dance therapy, psychodrama, ceramics, music, painting, reading, creative writing, art therapy, personal care and grooming, disco, cooking, swimming, self-assertion, poetry, social support, relaxation and current events. Each program meets at a scheduled time each week. These programs are scheduled by Irving Link, the Director, with the input of the counselor staff. Each counselor at

the Lafayette Center spends approximately 5 to 15 hours each week in structured group activities. The aim of these activities is not to change a member's personality or to provide psychotherapy. Rather, the purpose of these activities is to enable each member to develop more effective social, vocational and interpersonal skills. The remainder of a counselor's working time is spent counseling members individually and serving as role models.

Each member of the Lafayette Center has a prescribed program or schedule. The counselors at the Center have primary responsibility for setting up a member's program of activity. Each counselor has a case-

load in addition to group activities. Each counselor at the Lafayette Center is also required to keep regular records in connection with group and caseload activities. For instance, all case records must include an activity schedule, a treatment plan, a semi-monthly report providing a brief evaluation of each member's functional status, and an attendance and performance record for group activities. Each counselor at the Center has a desk located on the second floor which is separated from other counselor desks by partitions. The record reflects that the counselors at the Center regularly discuss their caseloads with Irving Link, the Director.

The record reveals that most, if not all, of the counselors who have masters degrees primarily work at the Lafayette Center. Most of these counselors lead group activities in areas of their chosen fields of study. They also lead group activites, such as social support groups, which are not specifically related to their chosen fields of study. Similarly, all of the counselors at the Lafayette Center who have undergraduate degrees also lead group activities and are responsible for individual caseloads. One counselor at the Center, until shortly before the hearing, performed vocational and educational testing of members and developed programs for those who were deficient in certain

areas. At present, this employee performs educational testing functions.

The duties of the counselors at the Boerum Hill facility differ in certain respects because of the nature of the facility as a residence. The rules and regulations of the New York State Office of Mental Health governing community residences of this nature require that the residence itself shall not be the primary provider of rehabilitative services to its residents. As a consequence, most of the group activities in which residents participate take place at the Lafayette Center. Group activities at Boerum Hill are conducted during the evenings and on the weekends. At present, there are

approximately 8 or 9 counselors who work at Boerum Hill, including the 3 counselors who do not have undergraduate degrees. All of the counselors lead dance, recreation or socialization groups and have offices on the first floor of the facility. Approximately 6 of the counselors have individual caseloads and perform duties and fill out reports which are similar to those prepared by counselors at the Lafayette Center. One of the counselors who has a caseload also oversees the "Aids to Daily Living" program, herein called ADL program, which was established some time in December 1979. In brief, this program involves 3 employees, including 2 clerical employees and

one housekeeping employee, who assist residents in learning the skills of daily living, such as personal hygiene and room cleanliness. These employees spend approximately 5 hours per week in performance of this function under the guidance of counselors. 3/

3/The duties of the 1 housekeeping and 2 clerical employees who participate in the ADL program differ from the duties of counselors. The record reflects that these employees do not lead structured group activities and do not have caseloads for individual counseling. In addition, they do not perform record-keeping and reporting functions as do the counselors. They do not have offices and apparently do not attend the regular counselor meeting. There are also substantial difference in wage rates between the counselors and the clerical and housekeeping employees who participate in the ADL program. In view of these differences in job functions and other terms and conditions of employment, I find that the 1 housekeeping and 2 clerical employees who participate in the ADL program are not included in the unit found appropriate herein.

Another Boerum Hill counselor, in addition to his regular caseload, also coordinates the residents who participate in the Employer's incentive program. In brief, this program provides certain residents the opportunity to work on the Employer's premises and gain some vocational training. The residents receive incentive payments for services they perform. 4/ For instance, one food

4/At the hearing, neither the Petitioner nor the Employer claimed that the residents in the incentive program should be included in any unit found to be appropriate herein. The record reveals that the sole purpose of the incentive program is rehabilitative in nature. Accordingly, I find that residents who participate in the incentive program who would otherwise be included in the unit found appropriate herein are not eligible to vote. Goodwill Industries of California, 231 NLRB 536 (1977), and cf., Cincinnati Association for the Blind, 235 NLRB 1448 (1978).

The Employer also utilizes maintenance and elevator operator employees as night counselors at the Boerum Hill facility. The record reflects that these employees, unlike most of the counselors, do not have regularly assigned caseloads. Although they may organize recreational activities, they do not lead residents in structured group activities. The record is unclear with respect to what their specific duties are as night counselors.

Most of the employees employed in non-counselor categories work at the Boerum Hill facility. The record reflects that they occasionally speak to residents about their problems and assist them in learning daily living skills such as personal hygiene and

room cleanliness. The record reflects, however, that there are substantial differences in terms and conditions of employment of counselor employees and non-counselor employees. For instance, there are differences in wage rates and certain fringe benefits. The counselor staff participates in separate staff meetings. None of the support personnel lead any group activities at the Lafayette Center. Although the record reveals that support personnel may lead group activities at the Boerum Hill facility in the future, they do not lead group activities on a regularly assigned basis at the present time, except for occasional recreation activities. Except for several housekeeping and clerical

employees, none of the support personnel utilize assigned desks or offices. In addition, there is no evidence in the record to indicate that any support personnel have assigned caseloads for individual counseling. Except for an occasional seizure report, the support personnel do not keep files on individual residents. These records are kept by the counselors and appear to be available only to counselors and their immediate supervisors. At the hearing the executive director testified that the job functions of the staff are interchangeable only to the extent that all staff members are required to give residents support, guidance and reassurance.

Turning to the question of the

scope of the unit, the Petitioner asserts that counselors employed by the Employer who possess masters degrees are professional employees. In its view, all other counselors employed by the Employer, regardless of educational background, are technical employees. The Petitioner seeks a combined unit of professional and technical employees. In the alternative, it seeks an election in separate professional and technical units.

The Employer asserts that it does not employ any employees who perform professional or technical functions. According to the Employer, the job functions and duties of all employees are interchangeable and interrelated. In its view, the only appropriate unit

is that which includes all employees, including counselors, housekeeping employees, food service employees, maintenance employees, elevator operators and clerical employees.

The employees in the combined unit sought by the Petitioner clearly perform specialized tasks which are separate and distinguishable from those performed by support personnel. Most, if not all, of the counselors lead structured group activities, engage in individual counseling with respect to individuals in their assigned caseloads, and evaluate the performance of members and residents. All but one or two of the counselors have graduate degrees, undergraduate degrees, or are working toward graduate or undergraduate degrees.

Moreover, the wage rates, fringe benefits and other terms and conditions of employment of counselors and support personnel differ in several important respects as is more fully set forth above. Most importantly, witnesses for the Employer at the hearing acknowledged that the performance of a counselor's duties involves some exercise of independent judgment. Based on the foregoing and the record as a whole, I find that the counselors share a community of employment interests which is separate and distinguishable from the other employees employed by the Employer as housekeeping employees, food service employees, elevator

operators and maintenance employees. 5 /

Although the counselors do not meet the strict requirements of the term professional employee as defined in the Act, their job duties and functions are of a technical nature. Although they are not required by the Employer to have graduate or undergraduate degrees, most, if not all, of the counselors have graduate

5 /Although the Employer cited Appalachian Regional Hospitals, Inc., 233 NLRB 542 (1977), Sodat, Inc., 218 NLRB 1327 (1975), and The Menninger Foundation, 219 NLRB 690 (1975) in support of its position that an all-inclusive unit is appropriate, these cases are inapposite because the unions therein sought elections in all-inclusive units, or sought a unit which did not constitute a homogeneous grouping such as the counselors in the instant case.

or undergraduate degrees or are working toward graduate or undergraduate degrees. In addition, the record reflects that the performance of a counselor's duties requires some exercise of independent judgment, particularly with respect to structured group activities, individual counseling, and record-keeping concerning the performance of members and residents. Accordingly, I conclude that the counselors are technical employees within the meaning of the Act, 6/ and constitute an appropriate unit.

6/ cf., Milwaukee Sanitarium Foundations, Inc., 219 NLRB 1043 (1975) (activity therapists), and Duke University, 226 NLRB 470 (1976), at 473 (social service representatives).

Inasmuch as the record is unclear with respect to the specific duties of night counselors, I shall allow them to vote subject to the challenge.

With respect to the eligibility issue, the Petitioner maintains that the 15 residents of the Boerum Hill facility who work for the Employer are not employees within the meaning of the Act and should not be eligible to vote. In the alternative, it asserts that they do not share a community of interests with other employees because they are receiving rehabilitation services from the Employer. The Employer maintains that these individuals are employees within the meaning of the Act and also share a community of interest

with all other employees.

In a situation where clients are claimed to be employees, the Board requires a two-fold inquiry: first, is rehabilitation the purpose of the employer-client relationship; and second, are employee clients treated in most respects as non-client employees. 7 / In the case at bar, the record does not indicate the number of counselors who are residents of the Boerum Hill facility, and whether their specific duties differ from those of non-resident counselors. In addition, the record is unclear with respect to how the

7 /Goodwill Industries of Southern California, 231 NLRB 536 (1977) and Cincinnati Association for the Blind, 235 NLRB 1448 (1978).

residents obtained employment with the Employer. Moreover, it is not clear whether counselors evaluate resident employees as part of their counseling duties. Although the record indicates that resident and non-resident employees share similar wage rates, fringe benefits and supervision, it is unclear with respect to the rehabilitative aspects of the employment relationship. Accordingly, I shall allow residents of the Employer's Boerum Hill facility who are included in the unit found appropriate herein to vote subject to challenge.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining

within the meaning of Section 9 (b) of the Act:

All technical employees including counselors employed by the Employer at the Brooklyn Psychosocial Rehabilitation Institute and at the Boerum Hill Rehabilitation Residence, excluding all housekeeping employees, food service employees, maintenance employees, elevator operators, clerical employees, professional employees, and all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of

election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been

discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale Department Store Union, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the

opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and address of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 16

Court Street, Brooklyn, New York 11241 on or before March 31, 1980. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W.,

Washington, D.C. 20570. This request must be received by the Board in Washington by April 7, 1980.

DATED: March 24, 1980
at Brooklyn, New York

/S/ Samuel M. Kaynard
Samuel M. Kaynard
Regional Director, Region 29
National Labor Relations Board
16 Court Street
Brooklyn, New York 11241

No. 83-1661

In the Supreme Court of the United States

OCTOBER TERM, 1983

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that counselors at petitioner's rehabilitation facility are not managerial employees excluded from coverage under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A12) is not reported. The decision and order of the National Labor Relations Board (Pet. App. A13-A50) are reported at 264 N.L.R.B. 114. The decisions and direction of election by the Board's Regional Director in the underlying representation proceeding (Pet. App. A51-A155) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984. The petition for a writ of certiorari was filed on April 11, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A1-A8.

STATEMENT

1. Petitioner operates a rehabilitation program for deinstitutionalized mental patients. In early 1980, the Union[1] petitioned to represent counselors at petitioner's institute.[2]

Petitioner's institute comprises a residential facility providing "psychosocial rehabilitation" for approximately 200 residents and a separate facility providing social and vocational training and other rehabilitative services (Pet. App. A120-A121). Generally, the goal of the institute is to impart the very basic skills required to function normally in society, *e.g.*, personal hygiene, cleaning, shopping, cooking, finding an apartment, opening a bank account, and filling out an employment application (Pet. App. A85). Responsibility for the overall development and policies of the institute lies with a board of directors. An executive director is "[r]esponsible for the coordination, operation, staff training, effective functioning and general overall direction of the facility [, including] planning of program, staff assignments, supervision of staff, [and] maintaining required records" (C.A. App. 176). The executive director has general supervisory authority over counselors, and is generally responsible for their hiring, firing, evaluation and discipline (Pet. App. A123; C.A. App. 25, 29, 43, 76, 99, 176, 410).

The institute employs approximately 22 counselors in its two facilities. The counselors are not professionally trained therapists or social workers, and there are no formal educational requirements other than the ability to read and write. Some of the counselors are former residents of the institute.

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[1]District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, and Department Store Union, AFL-CIO.

[2]In its initial petition filed December 10, 1979, the Union sought to represent all employees at the Institute. The Union later amended its petition to seek a unit consisting only of counselors. Pet. App. A51-A52, A57 n. 5, A119.

Pet. App. A60-A61. Counselors serve as "role models" for residents or "members," assisting them in basic concerns of employment, diet and hygiene, and acting as advocates for individuals in dealing with various governmental agencies. In addition, counselors lead structured group programs involving career counseling, dance and art therapy, crafts, swimming, cooking, interpersonal skills, and other activities. Counselors prepare activity schedules and "treatment plans" for each member in their caseload, outlining how the counselor thinks each will most benefit from the counselor's role model function, and they also prepare periodic status, attendance, and performance reports. Pet. App. A61-A63, A131-A137. Finally, in addition to their duties serving members, counselors help operate the elevator at the residential facility, make repairs to institute property, clean up after members, and conduct initial interviews of persons referred for admission to the institute (Pet. App. A62).

Counselors are closely supervised by the executive director, Irving Link, in handling their caseloads. Although each counselor designs members' treatment plans initially, Link regularly reviews and revises them as he sees fit, and the institute's medical director is required to give formal approval to each program. Pet. App. A63-A64; C.A. App. 257, 525. Link meets with each counselor individually for approximately four hours a week in order to discuss the status and progress of each member and to give Link an opportunity to instruct the counselors on implementation of the various programs. Counselors are not free to alter their group programs without Link's approval. Pet. App. A63-A64, A123; C.A. App. 26, 29, 33, 34, 40, 42, 48, 49, 51. When a counselor has a problem in dealing with an outside agency, the counselor takes the problem to Link or another

supervisor.[3] Supervisors have ultimate responsibility for disciplining or directing hospitalization of members. Pet. App. A65; C.A. App. 114, 125. Link schedules the members' group activities (Pet. App. A65; C.A. App. 53). He also closely supervises counselors' maintenance of the required case records (C.A. App. 821, 824, 843, 886, 757, 762).

In addition to their individual meetings with Link, counselors meet with him as a group once a week. These weekly meetings serve primarily as a means by which counselors "receive additional guidance and supervision from the Administration, and general information on the running of the * * * facility" (Pet. App. A92-A93). Among the subjects discussed at these meetings are: matters concerning the discharge, expulsion and admission of members; assignment of counselors to therapy groups and the subject matter, number, and scheduling of such groups; teaching methods; treatment plans for particular members; discipline; and ordering of supplies.

Counselors — like petitioner's other employees who perform housekeeping, food services, maintenance, and clerical functions — punch a time clock and are paid on an hourly basis starting at $3.10 an hour. All employees receive similar fringe benefits, holidays, overtime pay and leave privileges. Counselors are evaluated on the same evaluation form and for the same performance attributes as other employees. Pet. App. A59-A60; C.A. App. 77, 88, 173-174.

2. Following a hearing on the Union's representation petition,[4] the Board's Regional Director issued a Decision and Direction of Election on March 24, 1980 (Pet. App. A116-

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[3]In addition to Link, the institute's administration includes the medical director, a manager of the residential facility and a director of the separate rehabilitation center (Pet. App. A58).

[4]At this hearing, petitioner did not contend that counselors were managerial employees. It maintained only that the counselors should be included in a bargaining unit with all other employees, including housekeeping, food services, maintenance, elevator operator, and clerical employees. Pet. App. A54 n.3.

A155). The counselors selected the Union as their bargaining representative, and the Board certified the Union on May 6, 1980 (Pet. App. A52). Thereafter, petitioner moved to reopen the representation hearing record, contending that the counselors were managerial employees exempt from coverage of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, under this Court's then-recent decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980).[3] The Regional Director granted the motion to reopen the record and a further hearing was conducted from March to May 1981.

At the supplemental hearing, petitioner contended that counselors were managerial employees when the Regional Director issued the March 24, 1980, Decision and Direction of Election, and alternatively that the counselors acquired added duties and responsibilities following the Union's certification that converted them to managerial employees under *Yeshiva* (Pet. App. A56, A95). In a Supplemental Decision and Order, the Regional Director rejected both contentions and affirmed the Union's certification (Pet. App. A51-A115). The Regional Director noted that the Court in *Yeshiva* had found the university faculty members there involved to be managerial employees on the basis of their authority to make final decisions and effective recommendations on a wide range of management concerns, so that the faculty were, " 'in effect, substantially and pervasively operating the enterprise' " (Pet. App. A79-A80 & n.24, (quoting *NLRB* v. *Yeshiva University*, 444 U.S. at

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[3]The Court's decision in *Yeshiva* issued February 20, 1980, on the last day of the initial representation hearing (Pet. App. A77). Petitioner contended that, because *Yeshiva* overruled prior Board precedent, it should be permitted to present evidence on the managerial status of the counselors (Pet. App. A53-A54).

691)).[6] The Regional Director found that, by contrast, petitioner's counselors made few independent decisions and "performed their duties under close supervision from their supervisors" (Pet. App. A89, A95). The Regional Director found that "counselors made no final decisions or compelling recommendations regarding financial matters, the hiring or firing of other counselors, promotions or evaluations of other counselors, the salaries of counselors, the scheduling of counselors, the amount to be charged members/residents (tuition), or the location of the facility" (Pet. App. A90-A91). Based on the "amount of supervision the counselors receive, the limited skills the counselors are required to have, and the insignificant amount of time the counselors allegedly spend on making 'managerial' type decisions," the Regional Director concluded that the counselors were not managerial employees (Pet. App. A94-A95).[7] The Board denied petitioner's request to review the Regional Director's decision (Pet. App. A26).

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[6]The Regional Director noted that the *Yeshiva* Court found the faculty in that case to have managerial status based on its ability to make final decisions and effective recommendations in matters of curriculum, attendance, teaching methods, grading policies, matriculation standards, student body size, tuition, location of school, teaching loads, student absence policies, faculty hiring, tenure, sabbaticals, terminations, promotions, and budget (Pet. App. A79-A80; see *NLRB* v. *Yeshiva University*, 444 U.S. at 675-677 & nn.3-5, 686 & n.23).

[7]The Regional Director also rejected petitioner's contention that changes in the counselors' responsibilties after the Union's certification made them managerial employees. Petitioner relied on evidence purporting to show that the job title of counselors was changed to "manager"; that counselors had slightly expanded input into decisions concerning the hiring, firing, and evaluation of other counselors and employees, the admission of persons to the program, the purchase of additional supplies, personnel policies, and hours of the facilities; and that counselors began receiving regular reports concerning the institute's finances (Pet. App. A95-A111). The Regional Director noted that petitioner's evidence was in conflict "as to the extent of independence the counselors have in decisions concerning their own employment

3. Petitioner refused to recognize and bargain with the Union as the counselors' representative, and the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to recognize and bargain with the Union as representative of the counselors. Pet. App. A42-A46.[8]

4. The court of appeals enforced the Board's order in full. The court held that (Pet. App. A10-A11):

> The responsibilities of the Institute's counselors fall far short of that "absolute" authority over academic matters on which the Supreme Court relied in applying the managerial exclusion to the faculty in *NLRB* v. *Yeshiva University*, 444 U.S. 672, 686 (1980). There, the relevant bargaining unit consisted of all full-time faculty, including Assistant Deans, senior professors

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conditions", that counselors continued to perform their duties under close supervision from the Administration, and that their duties and authority were essentially unchanged from their duties prior to March 1980 (Pet. App. A96, A111-A112).

[8]In opposition to the motion for summary judgment, petitioner contended that the Board's intervening post-*Yeshiva* decisions in *Ithaca College*, 261 N.L.R.B. 577 (1982), *Thiel College*, 261 N.L.R.B. 580 (1982), and *Duquesne University of the Holy Ghost*, 261 N.L.R.B. 587 (1982), compelled the conclusion that petitioner's counselors were managerial employees. The Board rejected that contention, finding that each of the cited cases involved university faculty with power to make decisions and effective recommendations similar or identical to the authority of the faculty in *Yeshiva*, and that each of these cases, like *Yeshiva* itself, was therefore distinguishable from the instant case (Pet. App. A18-A27).

and department chairmen. Here, the unit was composed of employees who work forty hours a week, punch a time clock and are paid between $4 and $8 per hour. Collectively, they do not exercise the indispensable policy-making role of the Yeshiva faculty. On the contrary, they operate under the close supervision of, and pursuant to administrative directives issued by, the executive director of the Institute.

* * * * *

The conflict of interest concerns which troubled the *Yeshiva* court are minimal here, because the management does not rely nearly so heavily upon the professional judgment of the counselors.[9]

ARGUMENT

In *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), this Court held that full-time faculty members of that university were managerial employees excluded from coverage of the National Labor Relations Act on the basis of their authority to make final decisions and effective recommendations on a range of policy matters crucial to the operation of the enterprise, including absolute authority in academic matters (see note 6, *supra*). Petitioner's sole contention is that the Board misapplied the holding of *Yeshiva* in concluding that counselors at the mental health rehabilitation facility here involved were not managerial employees. That contention merely amounts to a challenge to the Board's application of settled principles to the facts of this particular case, and thus does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the court of appeals correctly found, the facts

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[9]The court also rejected as unsupported by the record petitioner's claim that changes since *Yeshiva* converted the counselors to managerial employees (Pet. App. A11).

summarized in the statement above (pages 2-4, *supra*) provide ample support for the Board's conclusion that the counselors are not managerial employees under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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